Supreme Court, U. S.
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Supreme Court of the United States

October Term, 1976

No. 76-744

EDWARD J. BENNETT,
Appellant

v.

MELDRIM THOMSON, JR.
LYLE E. HERSOM
JAMES H. HAYES
LEON G. YEATON
LOUIS D'ALLESANDRO
BERNARD A. STREETER, JR.
Appellees

Appeal from the Supreme Court of
New Hampshire

MOTION TO AFFIRM

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MOTION TO AFFIRM

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, respectfully move that the final judgment and decree of the Supreme Court of the State of New Hampshire, as reported at 116 N.H. , 363 A.2d 187 (1976), be affirmed. The decision of the New Hampshire Supreme Court is well-grounded in fact and law and the ques-

tion presented on this appeal, in the context of this case, is not so substantial as to warrant further consideration by this Court.

JURISDICTION

The Constitutional and statutory jurisdictional predicate for this appeal is adequately set forth in Appellant's Jurisdictional Statement.

QUESTION PRESENTED

Whether an unclassified state employee, appointed to his position by the Governor and Executive Council, may, after public hearing, lawfully be dismissed by the appointing authority pursuant to state law permitting dismissal "for the good of the department . . . to which he is assigned," when the employee, in the course of his employment, makes a statement contrary to the specific orders of his superior and the established policy of his department, and as a result thereof the effectiveness and efficiency of his department is adversely affected.

STATEMENT OF CASE

On June 27, 1974, Edward J. Bennett [hereinafter Appellant] was appointed Director of the Division of Economic Development within the Department of Resources and Economic Development [hereinafter DRED] by the Governor and Executive Council [hereinafter Appellees] of the State of New Hampshire. As Director he was "responsible for the administration and operation of . . . [his] division, subject to the supervisory authority of the Commissioner [of DRED, George Gilman] . . . ." N.H. RSA 12-A:3 (Supp. 1975). Further, by statute, Appellant was to "serve, subject to the provisions of RSA 4:1, for a term of

four years." The provisions of RSA 12-A:2, defining the authority and duties of the Commissioner, and RSA 12-A:3, dealing with the responsibilities of Appellant, made it absolutely clear that Appellant, in the performance of his employment, was subject to the authority and supervision of the Commissioner. Further, the departmental structure itself implies and necessitates a coordinated, co-operative and responsive relationship between the Commissioner and his divisional directors.

In December, 1974, Parsons and Whittemore Corporation, an out-of-state industrial firm, was seriously considering the possibility of locating a modern pulp mill complex within the State of New Hampshire. Pursuant to the provisions of RSA Chapter 12-A, DRED played a major role in this proposed project, encouraging and assisting the firm in the formulation of its plans. Commissioner Gilman, pursuant to his statutory authority, determined as a matter of departmental policy that DRED would make every effort to assist and encourage the company to locate in New Hampshire, subject to compliance with all federal, state and local requirements. (*Findings and Order*, set forth in App. B. of Appellant's Jurisdictional Statement at 27). Appellant was personally opposed to this policy. By memo to the Commissioner, dated February 3, 1975, he registered his vehement disapproval and in a subsequent memo dated February 13, 1975, he requested that he be excused from either an official or unofficial capacity in either advocating or defending the proposition. (App. B. at 27). Commissioner Gilman gave serious consideration to Appellant's dissent, discussing it with others in DRED, and meeting with Appellant in February, 1975. After this meeting, in view of Appellant's strong convictions, the Commissioner agreed to release Appellant from official and unofficial duties connected with the pulp mill project. (App. B. at 27-28). In addition, however, the Commissioner clearly directed Appellant to make no statements relating to his [Director Bennett's] criticism of the department's policy. Appellant

understood the meaning of the Commissioner's directions and further "realized that any public statements made by him in his official capacity adverse to the policy of the Department relative to the Parsons and Whittemore proposal would certainly be harmful to the Department." (App. B. at 28).

Appellant chose to flaunt the directions of the Commissioner and, in total disregard of his order, made the following statement regarding the pulp mill proposal while addressing the Manchester, New Hampshire Chamber of Commerce in his official capacity:

> I'll be short and sweet on that one. The official policy of the administration because Governor Thomson unilaterally announced that the pulp mill will locate in the Connecticut River Valley, his official state policy is that we are pro pulp mill and it's official department policy that we are pro pulp mill. And it's official division policy that we are pro pulp mill. But I got chewed out two weeks ago by the Governor for speaking up on snow-making at Mt. Sunapee where I opposed spending eight hundred fifty thousand dollars for putting and making snowflakes for a few skiers when we have unemployed in the State. I think it was wrong and I think it's wrong now. But he told me that he expected me to, if I was going to be on the team, that when he blew the whistle that I would be on the field on his side, so, but I'm going to get off the field for just one minute and go on the bench and say that I think that that idea of a pulp mill stinks. It contravenes everything that this State, everything that we are trying to do, that I've talked to you about, about quality, it would be a catastrophe in my judgment. Don't quote me on that. I don't think that works with the Governor.

This public statement was a blatant act of insubordination and adversly affected the effectiveness, public credibility and efficiency of DRED. (App. B. at 30-31).

As a direct result of Appellant's conduct, on July 21, 1975, pursuant to RSA 4:1 and 12-A:3, and in compliance with the ruling of the New Hampshire Supreme Court in *Opinion of the Justices,* 115 N.H. 385, 341 A.2d 758 (1975), Appellees unanimously adopted a "Resolution in the Nature of a Petition for Removal," set forth in Appendix A. of Appellant's Jurisdictional Statement. The Petition set forth generally and with particularity the grounds for requesting the removal of Appellant. Appellant was served with a copy of this Petition on July 21, 1975.

On September 25, 1975, Appellees, with an Assistant Attorney General advising them on questions relating to procedural and substantive due process and special counsel presenting evidence in support of the Petition for Removal, conducted a public hearing. Appellant was represented by counsel at this hearing and was given full opportunity to cross-examine witnesses presented against him and to call witnesses of his own. On October 21, 1975, Appellees issued their Findings and Order, accurately set forth in Appendix B. of Appellant's Jurisdictional Statement, in which the following order was entered:

> NOW, THEREFORE, in accordance with the provisions of RSA 4:1, the Governor and Council hereby order that Edward J. Bennett be and hereby is removed from the office of Director, Division of Economic Development, within the Department of Resources and Economic Development, said order to be effective forthwith.

On October 24, 1975, Appellant filed a Motion for Rehearing with Appellees which was denied on October 29, 1975.

On November 24, 1975, Appellant filed a Petition for Certiorari in the New Hampshire Supreme Court, alleging, *inter alia,* that Appellant's dismissal was in violation of the First Amendment to the Constitution of the United States of America. On July 30, 1976, the Supreme Court of the State of New Hampshire issued its opinion dismissing Appellant's petition and holding,

> The director of economic development in the furtherance of his statutory duty to attract industry to the State acts through the spoken and written word. The facts found by the Governor and Council support their conclusion that the plaintiff's remarks on July 13, 1975 [sic], were knowingly insubordinate and seriously compromised his ability to effectively carry out the responsibilities of the department. Under these circumstances, his

removal "for the good of the department of resources and development" does not violate his first amendment rights.

(App. C. at 41) (Citations omitted).

Appellant thereupon filed a Motion for Rehearing in the New Hampshire Supreme Court on August 6, 1976 which Motion was denied on August 31, 1976.

ARGUMENT

A. THE DECISION OF THE NEW HAMPSHIRE SUPREME COURT SHOULD BE AFFIRMED.

1. *Speech directly related to and within the course of one's employment made in opposition to established policy and expressed orders of an employee's superior is not within the protective scope of the First Amendment.*

In *Pickering* v. *Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968), this Court held that as a general rule government employees cannot be forced to relinquish First Amendment rights to which they otherwise would be entitled as citizens. *Id.* at 568, 88 S.Ct. at 1734. *See also, e.g., Wieman* v. *Updegraff*, 344 U.S. 183, 73 S.Ct. 215 (1952); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 87 S.Ct. 675 (1967). *Pickering* overruled the dismissal of a public school teacher based upon certain letters critical of the teacher's superiors which the teacher had written to a newspaper. It was found that the teacher's letters had no effect on his ability to effectively perform duties relating to his employment. The Court noted that in instances in which an employee exercises his First Amendment rights and those actions are not directly and substantially related to his employment status, the employee is to be given the same broad First Amendment protection afforded other members of the general public.

391 U.S. at 574, 88 S.Ct. at 1738. The ruling in *Pickering* made it equally clear that where a direct and substantial relationship between the facts of employment and the subject matter of the speech exists, an employee is not to be regarded as a member of the general populace for the purposes of the First Amendment. *Id.* In applying the legal doctrine or standard set forth in *Pickering* to Appellant's dismissal, the New Hampshire Supreme Court appropriately ruled that Appellant's speech was not within the scope of the First Amendment's protection.

Several critical distinctions exist between Appellant's conduct and the conduct of the teacher in *Pickering*. Appellant's statement was made in his official capacity, while he was addressing a public group as the Director of the Division of Economic Development. Further, his speech involved substantial matters which were directly related to the operation of the division and the performance of his duties and responsibilities as Director. As the New Hampshire Supreme Court aptly noted, Appellant's statement was made in the furtherance of his employment, and hence, "Contrary to the situation in *Pickering* 'the fact of employment' is here directly and substantially 'involved in the subject matter of the public communication made'." (App. C. at 41). In view of the existence of this direct and substantial relationship between Appellant's speech and the facts of his employment, his dismissal was totally consistent with the *Pickering* rule and in no way violated his First Amendment rights.

In addition, it is noteworthy that Appellant's speech was made *during the hours of his work*. Courts interpreting the *Pickering* holding have recognized a crucial distinction between on-the-job and off-the-job speech. *See, e.g., Phillips* v. *Adult Probation Department of the City and County of San Francisco*, 491 F.2d 951 (9th Cir. 1974); *Goldwasser* v. *Brown*, 417 F.2d 1169 (D.C. Cir. 1969). In *Phillips*, the Circuit Court of Appeals upheld the suspension of a deputy probation officer for displaying a certain wall poster in his office. As was the case in the within action, the

probation officer's conduct was in direct contravention of a specific order of his superior. In upholding the suspension the court observed, "In distinguishing *Pickering* the district court properly noted the critical distinction between expressions outside work premises during off hours and those carried on during work hours and on the work premises." 491 F.2d at 955, n.9. Appellant has cited no authority in which this Court has limited the right of a public employer to restrict the conduct or speech of an employee *while performing his duties.* The distinction noted in *Phillips* and *Goldwasser* is surely a valid one and supports the validity of Appellant's dismissal. *See generally,* Grossman, *Public Employment and Free Speech: Can They Be Reconciled?,* 24 Admin. Law Review 109 (1972).

Another crucial distinction between Appellant's conduct and the actions of the teacher in *Pickering* is the fact that Appellant was directly ordered by his superior, prior to making his speech, to avoid making any public statement on the issue involved. There can be no doubt that Commissioner Gilman, pursuant to his powers and duties set forth in RSA 12-A:2, had the statutory authority to control and direct the operations of the Division of Economic Development. Included, by necessity, within this authority is the power to demand and expect co-operation and obedience by the director and all other employees within the department. Appellant acknowledged his subordination to the Commissioner at the hearing on September 25, 1975, in which he agreed that he was "subordinate to, responsible to, and subject to the supervision of" the Commissioner. Appellant was not precluded from addressing public issues unrelated to the performance of his job, as was the case in *Pickering.* He was not precluded or inhibited from exercising his right to express a belief, unrelated to his employment, or to associate with others for the purpose of espousing that belief, as was the case in *Elrod* v. *Burns,* U.S. , 96 S.Ct. 2673 (1976), heavily relied upon by Appellant. Rather, Appellant was given a specific and

limited directive by his superior — one relating directly to the performance of his job. Admittedly this Court has ruled that broad restrictions, such as loyalty oaths, which infringe upon or chill the exercise of First Amendment rights of all employees are unconstitutional. *See, e.g., Weiman* v. *Updegraff,* 344 U.S. 183, 73 S.Ct. 215 (1952). This Court has also recognized, however, that under certain circumstances limited restrictions placed upon particular employees are not violative of the First Amendment. *See, e.g., Shelton* v. *Tucker,* 364 U.S. 479, 487, 81 S.Ct. 247, 251 (1960). The narrow limitation placed upon Appellant's work-related speech constitutes such a permissible restriction.

It is well settled that a public employee may lawfully be dismissed for insubordination. *See, Elrod* v. *Burns,* U.S. at , 96 S.Ct. at 2686. To rule otherwise would effectively prevent the Government, as an employer, from maintaining the discipline and cohesion necessary to promote the efficient operation of government. *See, e.g., Phillips* v. *Adult Probation Department,* 491 F.2d at 955, n.10. Director Bennett chose to disobey the order of Commissioner Gilman and to flaunt the authority of his superior. The First Amendment in no way precludes his dismissal for this act of insubordination.

2. *Dismissal of Appellant for speech which had a serious detrimental effect upon his ability to perform his statutory duties and upon the credibility and effective operation of his department did not violate Appellant's First Amendment rights.*

In *Arnett* v. *Kennedy,* 416 U.S. 134, 94 S.Ct. 1633 (1974), this Court affirmed a ruling that under certain circumstances the discharge of a public employee may be lawfully based upon the employee's speech without offending the guarantees of the First Amendment. *Id.* at 160-61, 94 S.Ct. at 1647. Quoting from *Pickering, Arnett* noted,

> At the same time it cannot be gainsaid that the State has in-

> terests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Id.

In applying this balance test, it is essential to consider not only the validity and degree of the State's interests, but also the extent to which an employee's First Amendment rights are infringed upon. *See generally, Elrod* v. *Burns,* U.S. at , 96 S.Ct. 2673 (1976). In his Jurisdictional Statement Appellant relies heavily upon the decision of this Court in *Elrod* v. *Burns,* U.S. , 96 S.Ct. 2673 (1976). Clearly, a fact situation involving the dismissal of all employees based solely upon their political affiliation is distinguishable from the facts surrounding Appellant's dismissal. In *Elrod* the Court stressed the fundamental nature of one's right to express and support a given political view. *Id.* at , 96 S.Ct. at 2681. Further, the Court emphasized the lack of nexus between the Government's party-loyalty requirement and the employee's fulfillment of his duties. *Id.* at , 96 S.Ct. at 2683-84. The Court noted that the loyalty restriction was a *significant* impairment of employees' First Amendment rights and stated that this requirement was far more restrictive than was necessary to further the Government's interest in efficient operations. *Id.* at , 96 S.Ct. at 2684, 2687-88. The Court suggested, however, that a less restrictive requirement, such as the dismissal of all policy-making individuals based upon their party affiliation, would be valid. *Id.* In the instant case, the State placed no wide-ranging restriction on Appellant's exercise of his First Amendment rights. The "restriction" applied only to one limited subject matter, an area directly related to Appellant's employment status and the performance of his duties. Such a minor and insignificant intrusion

into Appellant's exercise of his First Amendment rights is greatly outweighed in this instance by the State's interest in providing efficient and orderly services.

Both *Arnett* and *Pickering* recognize that the First Amendment does not prevent the discharge of an employee who has made statements which impair the employee's effectiveness or impede the performance of his duties. *Pickering* stands for the proposition that government, as an employer, may lawfully discharge a person, such as Appellant in this case, if his speech impairs the faithful performance of his duties or interferes with the orderly operation of the department. 391 U.S. at 572-73, 88 S.Ct. at 1736-37. Further, the Court in *Pickering* recognized the importance to be placed upon the Government's interest in "maintaining either discipline by immediate superiors or harmony among co-workers." *Id.* at 570, 88 S.Ct. at 1735. Finally, the Court noted that where a close, day-to-day, working relationship exists between the employee and his superior, an employee's statements critical of his superior can be the basis for dismissal if they have the effect of undermining that relationship. *See, id.,* n.3.

There can be no doubt but that Appellant's actions here, in direct contravention of a specific order of his supervisor, would have a serious detrimental effect on Commissioner Gilman's ability to maintain discipline within the department. Commissioner Gilman so testified at the hearing on this matter. To argue otherwise completely ignores the role which obedience plays in maintaining discipline. To permit one employee, at will, to violate his superior's reasonable orders can have no effect other than to undercut the superior's authority and undermine discipline. *See generally, Phillips* v. *Adult Probation Department,* 491 F.2d at 955, n.10.

The effect which Appellant's statement had on the working relationship that existed between Appellant and Commissioner

Gilman also provides justification for his removal. In his Jurisdictional Statement, Appellant maintains that there was no testimony relating to the existence of the close relationship envisioned in *Pickering*. Further, he maintains that his statement is not rightfully characterized as a criticism of his superior. Such arguments simply ignore the practicalities of this matter. Implicit in the proper execution and efficient performance of duties and responsibilities under RSA 12-A:2 and 3, the statutes at issue before the Hearing Tribunal, is the existence of a constant and harmonious relationship between the Commissioner and his division heads. Without regard to the many other matters being handled by the department and division on a continuous basis, the record is replete with references to contact between the Commissioner and Appellant concerning the very policy Appellant disagreed with. Appellant had direct input to the Commissioner concerning this policy. Further, notwithstanding the provisions of RSA 12-A:2, which specifically provide that the power to establish department policy resides with the Commissioner, Appellant acknowledges that he did have "some ability to influence the formulation of policy within the Department." (Jurisdictional Statement at 15). Surely, this ability to influence policy decisions, of necessity, implies and requires Appellant's close working relationship with the Commissioner. In fact, this Court has recognized that such a close working relationship is likely to exist and necessary between policy-making employees. *See generally, Elrod* v. *Burns,* U.S. at , 96 S.Ct. at 2687-2689. In this case, Commissioner Gilman testified that he discussed the pulp mill proposal with Appellant in January, 1975, and "from that time on it was a matter of some discussion in the day-to-day operation of the Department." Given the type of departmental structure where the Commissioner and his division directors work together on a day-to-day basis, and, with each other, determine departmental policy, the close relationship alluded to in *Pickering* exists.

Appellant's argument that his criticism of the departmental policy should not be deemed criticism of the Commissioner, the one who was ultimately responsible for its formulation and implementation, defies logic. In his speech, Appellant did not stop with a mere recitation of his disagreement with the policy. Rather, he felt a need to color his opposition to the official policy with such inflammatory terms as "stinks" and "catastrophe." Appellant cannot now seriously maintain that this intemperate criticism of the very policy set forth and supported by the Commissioner is anything but open criticism of Mr. Gilman as well. *Pickering* acknowledged the serious consequences which such criticism might have on the workings of government, and thereby recognized such criticism as a valid basis for dismissal. 391 U.S. at 570, n.3, 88 S.Ct. at 1735, n.3. This Court itself noted in *Arnett* v. *Kennedy,*

> We think it is inherent in the employment relationship as a matter of common sense if not [of] common law that [a Government] employee . . . cannot reasonably assert a right to keep his job while at the same time he inveighs against his superiors in public with intemperate and defamatory [cartoons] . . . [Dismissal in such circumstances neither] comes as an unfair surprise [nor] is so unexpected as to chill . . . freedom to engage in appropriate speech.

416 U.S. at 161-62, 94 S.Ct. at 1648 (1974).

B. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

The Federal question inherent in employee dismissal cases, such as Appellant's, has been conclusively resolved by this Court. Review of this case would be of minimal value as a precedent.

In his Jurisdictional Statement, at 21, Appellant acknowledges that the issues presented by his dismissal are governed by the principles of law set forth in *Pickering* and *Elrod*. In addition to the legal guidelines delineated in those cases, this Court

has recently addressed the issue of application of the First Amendment to public employment in *Arnett* v. *Kennedy*, 416 U.S. 134, 94 S.Ct. 1633 (1974) and *United States Civil Service Commission* v. *National Association of Letter Carriers*, AFL-CIO, 413 U.S. 548, 93 S.Ct. 2880 (1973). In *Arnett*, the Court acknowledged that the issues presented in a case such as this are not susceptible to an all-inclusive and definitive rule of law. *See generally, Arnett* v. *Kennedy*, 416 U.S. 134, 94 S.Ct. 1633 (1974). This Court has recognized on several occasions that the balance test set forth in *Pickering* is the applicable standard in a case such as the one at bar. *See Arnett* v. *Kennedy*, 416 U.S. 134, 96 S.Ct. 1633 (1974) and *Elrod* v. *Burns*, U.S. , 96 S.Ct. 2673 (1976). The Court has also ruled that in each such case the validity of an employee's dismissal should be determined by application of its facts to this general test. Nothing more nor less than the foregoing was undertaken by the New Hampshire Supreme Court in reaching its decision.

The underlying and substantial federal question raised by a matter of this kind has already been decided by this Court. The request for review of Appellant's dismissal does not present this Court with a substantial federal question, but rather represents a request for yet another judicial review of the application of the narrow facts of this case to a well-established principle of law. Such a review would be of little value as a precedent.

CONCLUSION

Appellees respectfully submit that based upon the foregoing argument, and in furtherance of justice, the final judgment and decree of the New Hampshire Supreme Court should be affirmed.

Respectfully submitted,

Meldrim Thomson, Jr.
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By their attorneys:

PERKINS & BROCK

By /s/ David A. Brock
David A. Brock
Frederick E. Upshall, Jr.

CERTIFICATE OF SERVICE

I, Frederick E. Upshall, Jr., do hereby certify that in accordance with Rule 33 of the Rules of the Supreme Court of the United States of America, three copies of the foregoing Motion to Affirm were forwarded by first class mail, postage prepaid, to Kimon S. Zachos, opposing counsel.

/s/ Frederick E. Upshall, Jr.
Frederick E. Upshall, Jr.

Concord, New Hampshire
January 5, 1977